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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DANNY ARMS, Defendant and Appellant.	D043344 (Super. Ct. No. SCD173729)

APPEAL from a judgment of the Superior Court of San Diego County, John L. Davidson, Judge. Affirmed.

Danny Arms was convicted of simple mayhem (Pen. Code, § 203)[1] as a lesser-included offense of aggravated mayhem (§ 205, count one), assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1), count two) and battery with serious bodily injury (§ 243, subd. (d), count three). The jury also found true Arms inflicted great bodily injury during the assault. (§ 12022.7, subds. (a) and (b)). Arms was sentenced to an upper term of four years for felony assault (count two) plus a

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1 All statutory references are to the Penal Code unless otherwise specified.

consecutive five-year term for the great bodily injury enhancement. The court stayed sentence on the remaining counts pursuant to section 654.

Arms appeals, contending substantial evidence does not support his conviction for simple mayhem because permanent injuries to an organ--the brain--is not within the statutory definition of the crime. He also contends the court prejudicially erred by refusing to instruct on the defense's proposed pinpoint jury instruction.

I

FACTS

A. *Prosecution Case*

At approximately 6:30 p.m. on March 25, 2003, Arms and Brent Atkison had an altercation in a parking lot. Arms knocked Atkison to the ground and kicked him in the head while taunting and shouting "Get up!" Arms continued to kick Atkison as he lay motionless on the ground. He then walked away in a relaxed manner, leaving Atkison unconscious, bleeding and foaming at the mouth. Atkison sustained approximately 20 blows to the head.

Police arrested Arms after receiving a call from a witness to the incident. The officers smelled alcohol on Arms's breath but he did not otherwise appear intoxicated. His clothes were not torn or damaged and he did not have any visible injuries. He voluntarily told police what happened and did not attempt to flee.

When Atkison arrived at the hospital he was comatose because of blunt head trauma. He had bruises and scrapes on both sides of his head but scans and x-rays

showed no broken bones or fractures to the head or neck. Internally, Atkison sustained major bruising and bleeding throughout his brain resulting in permanent brain injury.

Atkison remained in the intensive care unit on life support for two months before there were any signs of improvement. At trial six months after the incident, he was conscious but remained in the hospital's rehabilitation unit. A treating physician testified Atkison is physically, emotionally, and intellectually disabled. He requires assistance in the tasks of day-to-day life, including walking and dressing. Atkison could speak but operated at the level of a six- or seven-year-old. He showed significant weakness in the left upper arm and left side of his body and appeared to favor his right side.

B. *Defense Case*

Arms testified he was homeless and living in a motel parking lot when he met Atkison in about September 2002. Atkison was also homeless. The men worked together performing maintenance jobs for nearby motels and sometimes drank together.

On the day of the altercation, Arms, Atkison and another man drank beer and worked together at the motel. They started drinking beer around 9:30 a.m. After work, Atkison drove Arms to a nearby bar where he and Arms intended to continue drinking. During the ride the men shared a pint of whiskey they bought en route.

The men parked in a lot across the street from the bar. Atkison walked to a nearby tree to urinate. Meanwhile, as Arms walked toward the bar, he noticed Atkison left his headlights on. Arms then entered the driver's side of the car, turned off the lights and closed the door. When Arms turned around, Atkison suddenly grabbed him by the throat with both hands. Arms testified the men had been "getting along fine" until this point.

Adrenaline and fear "took over" and Arms pushed Atkison away and kneed him in the head. Atkison grabbed Arms's shirt and crotch area as he fell to the ground. Arms began kicking Atkison, who continued to "growl" at him. Arms thought the "growling" indicated Atkison was "getting ready to initiate a charge back" and feared Atkison would use his pocket knife or try to run Arms over.

Arms did not think Atkison was in any real danger. He thought Atkison was knocked out but believed he would regain consciousness, "get in his car and have a couple bumps, a couple knots on his head, maybe, and a bloody nose and drive home."

Arms believed Atkison became aggressive and ornery when he was drunk and recounted two confrontations that occurred before the charged crime. The first occurred at the motel when Atkison was drunk and asked Arms for a cigarette. Atkison started talking loudly and Arms believed he wanted to start a fight. Atkison threatened to slap a cigarette out of Arms's mouth and "whip [his] ass." The motel owner threatened to call police because of the noise, but Arms calmed Atkison down.

The second incident occurred the next day. Atkison apologized to Arms for being "out of line." Arms responded that Atkison had no reason to "come on [to him] like that." Atkison tauntingly responded something to the effect of: "Well, the next time it happens, I guess we'll go, okay?"

The defense argued Arms did not specifically intend to inflict permanent injury and his reaction stemmed from a history of mental problems and drug abuse. Arms testified until he was 14 years old he lived with a violent alcoholic stepfather who physically and mentally abused him. On one occasion when Arms was 12 years old, his

stepfather reached across the dinner table and grabbed him by the throat. The next thing he remembered was regaining consciousness on the floor, shaking and crying. On another occasion, the stepfather punched him so hard he lost consciousness.

Psychologists testified interviews and psychological testing suggest Arms suffered from post-traumatic stress disorder as a result of his stepfather's long-term physical and mental abuse. The psychologists opined Arms's impulsivity, misinterpretation and poor judgment in reaction to being choked by Atkison were symptomatic of post-traumatic stress disorder. Arms also suffered from (1) addiction to various drugs and alcohol; (2) bipolar schizoaffective disorder manifesting in extreme mood swings, hallucinations or delusions, and psychotic behavior; (3) personality disorder manifesting in paranoia; and (4) situational aggression.

II

DISCUSSION

A. *Mayhem*

Arms contends the evidence was insufficient to support his conviction for mayhem because Atkison's various disabilities resulted from an injury to his brain–an organ–that he asserts is not a "member of [the] body" as that term is used in section 203.

1. Section 203

Section 203 provides, in a definition not substantively amended since 1873: "Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem."

Mayhem is a crime of ancient origin. In early common law it involved " 'violently depriving another of the use of such of his members as may render him the less able in fighting, either to defend himself, or to annoy his adversary.' " (2 Lafave, Substantive Criminal Law (2d ed. 2003) § 16.5(a), p. 599.) As early as 1670 the crime was expanded to include disfigurement. (*People v. Keenan* (1991) 227 Cal.App.3d 26, 34.) Section 203 has been applied to a facial cut of three inches in length (*People v. Newble* (1981) 120 Cal.App.3d 444, 448-451, 453), permanent disfigurement caused by cigarette burns to a woman's breasts (*Keenan,* at pp. 29, 33) and the tattooing of a victim's breasts and abdomen (*People v. Page* (1980) 104 Cal.App.3d 569, 576).

As the crime has evolved, the section is now concerned with "the preservation of the natural completeness and normal appearance of the human face and body" (*People v. Newble, supra*, 120 Cal.App.3d at p. 451) and with injures that disable or render useless a member of the victim's body. (§ 203.) As was stated in *People v. Page, supra*, 104 Cal.App.3d at page 578, "[t]he law of mayhem as it has developed protects the integrity of the victim's person."

2. Discussion

Arms notes the injury he inflicted on Atkison was to his brain and permanent injury of an organ, although perhaps amounting to aggravated mayhem under section 205, a section added to the Penal Code in 1987, does not qualify as simple mayhem under section 203. Arms notes aggravated mayhem requires an intent to deprive a human being "of a limb, organ, or member of his or her body." (§ 205.) He notes legislative history stating section 205 was intended to cover injuries to an organ not included in section 203.

Arms argues the brain is an organ and the legislative history of section 205 suggests an injury to an organ while an aggravated mayhem under section 205 cannot be a simple mayhem under section 203. (Assem. Com. on Public Safety, analysis of Sen. Bill No. 589 (1987-1988 Reg. Sess.) as amended June 23, 1987.) He contends, therefore, Atkison's brain injury could not qualify as simple mayhem.

It is unnecessary to consider the questions of whether an injury to an organ or a brain injury resulting only in a mental disability is mayhem under section 203. In this case a brain injury resulted in permanent physical disabilities.

Arms's argument appears based on the unstated premise mayhem is concerned with the locus of an injury. It is concerned rather with the effect of an injury on the integrity of the body. It is of no consequence that the loss of bodily integrity, for example, the disability of an arm or leg, is the result of an injury to a muscle or peripheral nerve or to the central nervous system. The disability is equally as real. The loss of the use of a limb, for example, can be caused by its removal, damage to its skeletal or muscular structure, nerves, the spinal pathways to the brain or to the part of the brain that controls its functioning.

Although the repeated blows delivered by Arms were to Atkison's head, they caused brain injuries resulting in permanent physical disabilities. The injury resulted in significant weakness to his left upper arm and the left side of his body. The injury caused him to favor his right side and to have difficulty in walking without assistance. The evidence was sufficient to convict Arms of simple mayhem.

B. *Instruction*

Arms argues the trial court prejudicially erred by declining his request to instruct the jury as follows: "One who has received threats against his person made by another is justified in acting more quickly and taking harsher measures for his own protection in the event of assault than would a person who had not received such threats."

Arms notes evidence that during their association he and Atkison had several verbal, but not physical, confrontations during which Atkison suggested the possibility he might assault Arms in the future. Based on this evidence Arms requested an instruction concerning the effects of prior threats on the right of self-defense. The trial court refused the requested instruction, stating it was covered by standard instructions.

Arms argues the requested instruction was non-argumentative, was a correct statement of the law and was not covered by other instructions. He argues the instruction was crucial to his defense. He notes at trial he testified he continued to kick Atkison after Atkison was on the ground because he was concerned if he did not Atkison might get up, stab him or get in his car and run him down.

Arms notes although his defense to the aggravated mayhem charge was his lack of the specific intent to cause permanent disability, his only defense to the remaining charges of simple mayhem, assault by means of force likely to produce great bodily injury and battery with serious bodily injury, each a general intent crime, was self-defense. The fact the assault continued after Atkison was no longer able to resist was, Arms concedes, an impediment to that defense. He argues it was highly important,

therefore, the jury be instructed that, considering Atkison's earlier threats, Arms was justified in taking harsher measures in his defense.

Arms's argument is inconsistent with the defense he presented at trial. He was charged with aggravated mayhem, a crime punishable by life imprisonment. The remaining charged offenses and attendant enhancements entailed far less serious punishment. As an understandable tactical decision defense counsel, while vigorously and successfully defending against the aggravated mayhem charge, conceded Arms was guilty of the remaining crimes.

The problem for defense counsel was that, if Arms's testimony was believed, he had the right to defend himself against Atkison's sudden and unprovoked attack, but continued to assault Atkison after he ceased being a threat. In argument, defense counsel stated: "Basically, he reacted. He reacted with the force that he thought was necessary. And he might have gone overboard. In fact, I'd submit that he did go overboard. He overreacted. He did not stop when he should have."

The majority of trial counsel's argument was directed to the charge of aggravated mayhem. In the part of her argument devoted to the other charges, counsel stated Arms's only defense to those charges was self-defense, i.e., he honestly and reasonably believed he needed to continue to kick Atkison after he was on the ground. Counsel then compared the more demanding elements of aggravated mayhem to those of the other offenses and the various defenses to the greater crime and ended her argument by saying: "I think if you look at all of the four factors [apparently the defenses and facts related to the crime of aggravated mayhem], based on those four factors, they apply only to specific

intent. And I invite you to find him guilty of counts 2 [assault] and 3 [battery] as well as the L.I.O. of count 1 [simple mayhem]. But I think for the reasons that he's guilty of those, he's not guilty on count 1 [aggravated mayhem]."

Assuming the trial court erred by not instructing on the effect of Atkison's threats on Arms's right of self-defense, the error was harmless. The threats played only a small part in his mental defense, and most importantly as a matter of tactics defense counsel conceded he had no defense to the charges of which he was convicted.

III

THE IMPACT OF *BLAKELY*[2]

A. Background

The prosecution sought the upper term sentence on Arms's assault conviction and filed a statement listing numerous aggravating factors to support the upper term; the probation report also recommended the upper term, citing numerous aggravating factors. Arms filed a statement seeking the mid-term, citing numerous mitigating factors. At sentencing, Arms argued the facts cited by the prosecution in aggravation did not support the upper term, and the factors in mitigation outweighed the factors in aggravation. The trial court sentenced Arms to the four-year upper term on the assault conviction, citing numerous aggravating facts, including that the crime involved great cruelty (Cal. Rules of

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2 *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*).

Court, rule 4.421(a)(1)),[3] and Arms's criminal history involved a pattern of violence (rule 4.421(b)(1)).

During the pendency of this appeal the United States Supreme Court issued its decision in *Blakely*, which held a state trial court's imposition of a sentence that exceeded the statutory maximum of the standard range for the charged offense on the basis of additional factual findings made by the court violated the defendant's Sixth Amendment right to trial by jury. (*Blakely, supra,* 124 S.Ct. at p. 2538.) Because the trial court imposed the upper term for the assault conviction, we requested further briefing from the parties on the effect of *Blakely* in this case.

In his brief, Arms contends that pursuant to the analysis of *Blakely*, the court's finding of facts to justify its imposition of upper term sentence violated his right to a jury trial. The Attorney General responds Arms waived or forfeited the issue by not raising a challenge to the sentences in the proceedings below, *Blakely* is inapplicable to California's sentencing scheme, and even if *Blakely* applies to California's sentencing, any error was harmless beyond a reasonable doubt.

B. The Issue Is Preserved

In *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*), the California Supreme Court held a defendant's failure to challenge in the trial court the imposition of an aggravated sentence based on erroneous or flawed information waived that issue for purposes of appeal. However, *Scott's* reasons for its waiver rule--the necessity to facilitate the prompt

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3 All rule references are to the California Rules of Court.

detection and correction of error in the trial court, thus reducing the number of appellate claims and preserving judicial resources (*id.* at pp. 351-353)--is a pragmatic rationale that does not support the application of the waiver rule here. Prior to *Blakely*, California courts and numerous federal courts consistently held there was no constitutional right to a jury trial in connection with a court's imposition of consecutive sentences. (*People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231; *U.S. v. Harrison* (8th Cir. 2003) 340 F.3d 497, 500; *U.S. v. Lafayette* (D.C. Cir. 2003) 337 F.3d 1043, 1049-1050; *U.S. v. Hernandez* (7th Cir. 2003) 330 F.3d 964, 982; *U.S. v. Davis* (11th Cir. 2003) 329 F.3d 1250, 1254; *U.S. v. Lott* (10th Cir. 2002) 310 F.3d 1231, 1242-1243; *U.S. v. White* (2d Cir. 2001) 240 F.3d 127, 136.) No published case in California held a different rule applied in connection with the imposition of an upper term. Because of this state of the law, an assertion of a constitutional challenge to the imposition of an upper term would not have achieved the purpose of prompt detection and correction of error in the trial court. Further, because *Blakely* was decided after Arms's sentencing, Arms cannot be said to have knowingly and intelligently waived his right to a jury trial. (See *Blakely, supra,* 124 S.Ct. at p. 2541 [noting "[i]f appropriate waivers are procured," a state is free to utilize judicial fact-finding in its sentencing scheme].)

The Attorney General argues Arms forfeited his right to assert the sentence was error because he did not object below.[4] However, Arms advocated in the trial court for a

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4 The Attorney General argues *U.S. v. Cotton* (2002) 535 U.S. 625 held a defendant's failure to object at trial can forfeit his right to assert improper sentencing under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) even though *Apprendi* had

mitigated sentence by filing a statement in mitigation urging the court to impose a lesser sentence. Under the circumstances, it would be unreasonable to find Arms forfeited a constitutional challenge of which he was unaware, and we find the forfeiture rule to be inapplicable.

C. *Blakely* Applies to an Upper Term Determination

In *Blakely*, the United States Supreme Court held " '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum [of the standard range] must be submitted to a jury, and proved beyond a reasonable doubt.' " (*Blakely, supra,* 124 S.Ct. at p. 2356.) The question of whether *Blakely* precludes a trial court from making findings on aggravating facts in support of an upper term is currently under review by the California Supreme Court. (*People v. Towne*, review granted July 14, 2004, S125677; *People v. Black*, review granted July 28, 2004,

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not been decided at the time of trial. The Attorney General argues, by extension, Arms's failure to object at trial forfeited his right to assert improper sentencing under *Blakely* even though his trial pre-dated *Blakely*. However, the Attorney General does not articulate how the forfeiture doctrine is distinct from *Scott's* waiver doctrine, much less why such distinctions should call for a different analysis. Moreover, *Cotton* evaluated a distinct claim--whether a grand jury indictment alleging conspiracy to possess and distribute drugs but omitting any quantity allegation--deprived the court of the ability to sentence the defendant to the higher sentence based on the amount possessed when the defendant did not object *and it was " 'essentially uncontroverted' "* the amount possessed by the defendant qualified for the higher sentence. (*Cotton,* at pp. 632-633.) *Cotton* effectively concluded the omission was harmless because, considering the evidence, "[s]urely the grand jury, having found that the conspiracy existed, would have also found that the conspiracy involved [the requisite amount]." (*Id*. at p. 633.) Thus, the forfeiture analysis in *Cotton* turned on its conclusion the omission was harmless to the defendant's rights. Here, however, Arms did contest the factual basis for the sentence and it was not " 'essentially uncontroverted' " the aggravating factors cited by the trial court were present.

S126182.) Pending resolution of the issue by the Supreme Court, we must determine whether *Blakely* applies here.

Under California's determinate sentencing law, where a penal statute provides for three possible prison terms for a particular offense the court is required to impose the middle term unless it finds, by a preponderance of the evidence, the circumstances in aggravation outweigh the circumstances in mitigation. (§ 1170, subd. (b); rule 4.420(c), (d).) The Attorney General argues imposition of an upper term under the California determinate sentencing scheme is not the same as "the imposition of a penalty beyond the standard range" and thus does not implicate *Blakely*. We conclude this distinction is one without a difference. Although an upper term is a "statutory maximum" penalty in the sense it is the highest sentence a court can impose for a particular crime, it is not necessarily the "maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant,*" which is the relevant standard for purposes of applying *Blakely.* (*Blakely, supra,* 124 S.Ct. at p. 2357; see *Apprendi, supra,* 530 U.S. at pp. 491-497 [state hate crime statute authorizing the imposition of an enhanced sentence based on a judge's finding of certain facts by a preponderance of the evidence violated the due process clause]; *Ring v. Arizona* (2002) 536 U.S. 584, 592-593.)

As explained in *Blakely,* when the judge's authority to impose a higher sentence depends on the finding of one or more additional facts, "it remains the case that the jury's verdict alone does not authorize the sentence," as required to comply with constitutional principles. (*Blakely*, supra, 124 S.Ct. at p. 2538.) The same is true here. Because the

maximum penalty the court can impose under California law without making additional factual findings is the middle term, *Blakely* applies.[5] Thus, the question becomes whether the trial court could properly rely on any of the cited factors as the basis for its decision to impose the upper term without violating *Blakely*.

In the present case the trial court relied on a number of aggravating factors as the basis for its decision to impose the upper term for the assault conviction, and in particular found Arms evidenced a high degree of cruelty, and his history showed a pattern of violence. Under *Blakely,* the Constitution requires a jury to determine any fact "the law makes essential to the punishment" other than the fact of the defendant's prior conviction. (*Blakely, supra,* 124 S.Ct. at p. 2537, fn. 5, p. 2540 [any fact that pertains to whether the defendant has a legal right to a lesser sentence].) Applying those standards to the present

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5 The Attorney General correctly notes *Blakely* and *Apprendi* expressly preserved *Almendarez-Torres v. U.S.* (1998) 523 U.S. 224, which held a defendant has no right to have a jury determine the truth of a prior conviction allegation. From this foundation, the Attorney General argues Arms's record of multiple convictions automatically qualified him for the upper term under rule 4.421(b)(2), regardless of the presence of other aggravating factors (because a single factor in aggravation may qualify a defendant for the upper term, see *People v. Cruz* (1995) 38 Cal.App.4th 427, 433), and under *Almendarez-Torres* a court may determine the truth of this "upper-term-eligible" factor for sentencing purposes without offending the federal Constitution. The Attorney General's argument is that because the combined impact of the jury's verdict and the court's *Almendarez-Torres* finding makes the upper term a permissible sentence, the trial court's remaining decision of *whether* to impose the maximum term may be guided by consideration of traditional sentencing factors unencumbered by *Blakely's* requirements for jury findings. There is a split of authority whether rule 4.421(b)(2)'s "numerous" or "increasing seriousness" issues are *Blakely* issues. (*People v. George* (2004) 122 Cal.App.4th 419, 425-426 [increasing seriousness is a *Blakely* issue].) We need not reach this question because the trial court did not rely on rule 4.421(b)(2) for its sentencing decision.

case, there is no finding by the jury on which the trial court could rely for the selection of the upper term. Accordingly, we find on this record the court's decision to select the upper term for the assault conviction violated the defendant's Sixth Amendment right to a jury trial, as defined in *Blakely*.

D. The Harmless Error Argument

The Attorney General argues even if *Blakely* requires jury findings on facts justifying selection of the upper term in some cases, the error was harmless beyond a reasonable doubt.[6] The Attorney General argues the evidence at trial provided overwhelming or uncontradicted proof of the aggravating circumstances relied on by the trial court for the upper term, and therefore there is no doubt the jury would have found true the aggravating factors cited by the trial court had those issues been presented to the jury.

We doubt denial of a jury trial on the existence of fact-based aggravating factors is subject to a harmless error analysis. Ordinarily, the denial of a right to a jury trial is a structural defect resulting in a miscarriage of justice and is reversible per se. (*People v. Collins* (2001) 26 Cal.4th 297, 311-313.) Therefore, it is irrelevant whether on appeal we are of the opinion beyond a reasonable doubt a jury would have found those factors to be established. Certainly the denial of a jury trial on the issue of guilt of the charged

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6 The Attorney General does not argue the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 should be applied, but instead argues that under *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327, the error is tested by the constitutional harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24.

substantive offense is not subject to a harmless error analysis and in a criminal case the trial court cannot issue a judgment of conviction after a jury acquittal, regardless of the overwhelming evidence of guilt. We see no reason the principle should be different when the denial of a jury trial relates to the existence beyond a reasonable doubt of fact-based aggravating sentencing factors under *Blakely*.

Even were we to apply the *Chapman* harmless error standard suggested by the Attorney General, we cannot say, beyond a reasonable doubt, the factors cited by the trial court would have been found true by the jury based on the evidence submitted at trial. Two of the factors cited by the trial court were a callous statement by Arms in a letter he wrote after the attack, and Arms'spattern of impulsive violence. This was *not* part of the evidence at trial, and therefore Arms had no occasion to subject that evidence to challenge, rebuttal or explanation. Another factor cited by the trial court was Arms showed great cruelty in the assault by focusing repeated blows to the victim's head, even after the victim had been rendered incapable of further defending himself, which "substantiate[d] that [Arms] was attempting to do very serious damage to the victim." However, the jury acquitted Arms of the aggravated mayhem charge while convicting him of the simple mayhem charge, and the principal difference between those crimes is the former requires the defendant have a specific intent to maim and act with extreme indifference to the well-being of the victim, while the latter offense omits those requirements. When we juxtapose the trial court's "acting with great cruelty" factor with the jury's apparent rejection of the "acting with extreme indifference" element, as well as the trial court's "attempting to do very serious damage" factor with the jury's apparent

rejection of the "specific intent to maim" element, we cannot conclude beyond a reasonable doubt the jury would have found true the factors relied on by the trial court had those been presented to the jury.

DISPOSITION

The sentence, insofar as the court imposed the upper term for the assault conviction, is vacated; in all other respects, the judgment is affirmed. The case is remanded to the superior court to conduct a new sentencing hearing consistent with the principles discussed in this opinion.

McDONALD, J.

I CONCUR:

AARON, J.

BENKE, Acting P.J., concurring and dissenting.

I concur with the majority opinion with the exception of section III THE IMPACT OF *BLAKELY* and the Disposition.

In section III the majority concludes *Blakely v. Washington* (2004) __U.S.__ [124 S.Ct. 2531] (*Blakely*) requires this case be remanded for resentencing because the trial court improperly aggravated the sentence based upon the "high degree of cruelty" of the crime and because appellant's history shows "a pattern of violence." My colleagues conclude these considerations should have been presented to a jury. I disagree.

First, the aggravating factors relied upon here by the sentencing court are traditional sentencing factors, not elements of the crime. Moreover, because the sentencing factors were not used to impose a sentence beyond that authorized by the statute for which appellant was found guilty, no new offense was created requiring any additional jury determination. (*Harris v. United States* (2002) 536 U.S. 545, 564-566 [122 S.Ct. 2406]; *People v. Wagener* (2004) 123 Cal.App.4th 424.)

It is true that the courts throughout California are divided on whether *Blakely* nullifies California's tripartite sentencing structure. It is difficult at this point to predict with certainty which way we will ultimately be directed. Because of this and in light of the clear language of *Harris,* I would decline at this point to open a window through which sentences are irreversibly and perhaps incorrectly lowered. Once our Supreme Court has spoken to the issue, I would, if then appropriate, fashion consistent relief by way of the writ process. Such a procedure would preserve appellant's right to relief and avoid a possible instance where some appellants secure a lowered term and others do not.

Second, as is evidenced in this case, one of the results of the eagerness to declare our tripartite sentencing structure invalid has been the confusion created in using prior convictions and criminal history as aggravating factors. We now find ourselves divided on whether a judge can, without violating *Blakely*, use as aggravating factors the number of priors, the increasing seriousness of priors or some combination of both. (See majority opn., p., 15, fn. 5.)

On this issue I would conclude that a defendant's criminal history, including the number and seriousness of priors, is a traditional sentencing factor under *Almandarez-Torres v. United States* (1998) 523 U.S. 224 [118 S.Ct. 1219]. Until and unless the California Supreme Court or the United States Supreme Court declares priors and/or criminal history to be an element of a crime, I would continue to treat them as sentencing factors and decline to confuse the situation any further by trying to apply *Blakely* to *Almandarez-Torres*.

My colleagues seek to avoid the confusion by finding that the trial judge here did not rely upon either the number or increasing seriousness of appellant's criminal history. (Majority opn., p. 15, fn. 5.) Respectfully, my colleagues have not considered the full, express statement offered by the trial court. In addressing appellant's pattern of violence, the court stated: "I have also looked at Mr. Arms' *entire criminal history*, *his prior arrests*, all of which demonstrate a pattern of violence, a pattern of impulsive violence, and this is just another outgrowth of that impulsive act of violence." (Italics added.) My colleagues do not state precisely what rule or rules of court the trial judge was referring to when it addressed these factors as aggravating circumstances. They conclude only that it

"did not rely on rule 4.421 (b)(2)" (majority opn., p. 15, fn. 5) which permits examination of the number or prior convictions and/or increasing seriousness of prior criminal activity.

Appellant's pattern of criminal history, which includes prior convictions, was set forth for the court in the probation report upon which the court was relying. In citing California Rules of Court rule 4.421(b)(2) as a possible aggravating circumstance, the report notes appellant's prior convictions as an adult "are tremendously numerous and of increasing seriousness." In the report's summary of priors for purposes of rule 4.421(b)(1), it notes three prior arrests and convictions for simple assault, assault, menacing, first degree intimidation (twice), two for domestic violence (one of which was on a vulnerable adult) and assault with a deadly weapon. There is also note of appellant's history of abuse toward arresting officers.

The court stated one aggravating factor was appellant's demonstrated pattern of violence as established through his entire history and prior convictions, which are clearly numerous and of increasing severity. At a minimum, the court was relying on the number of appellant's prior convictions.

For the reasons noted above I would affirm the judgment.

BENKE, Acting P. J.